No. 07-1180

In the Supreme Court of the United States

DEFENDERS OF WILDLIFE, ET AL., PETITIONERS

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Congress has directed the installation of physical barriers and roads to prevent illegal crossing of the Nation's border and has provided that, "[n]otwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads." Section 102(c)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-554, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 102, 119 Stat. 306. The questions presented are:

1. Whether this waiver provision constitutes an unconstitutional delegation of legislative power to the Executive because only limited judicial review is permitted.

2. Whether the Secretary's exercise of the waiver effected an unconstitutional repeal of federal laws in violation of Article I, Section 7 of the Constitution.

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OPINION BELOW

The opinion of the district court (Pet. App. 1a-20a) is reported at 527 F. Supp. 2d 119.

JURISDICTION

The judgment of the district court was entered on December 18, 2007. The petition for a writ of certiorari was filed on March 17, 2008. The jurisdiction of this Court is invoked under Section 102(c)(2)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 306.

STATUTORY PROVISION INVOLVED

Section 102(a)-(c) of IIRIRA, as amended in 2005 and 2006, is reprinted at App., *infra*, 1a-4a.

STATEMENT

1. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress sought, among other things, to improve security at the Nation's borders in order to halt illegal immigration. Section 101 of IIRIRA increased the number of border patrol agents and their supporting personnel. See 110 Stat. 3009-553. Section 102 of IIRIRA specifically addressed physical barriers at the Nation's borders. Section 102(a) required the Attorney General to improve barriers at the border, and specifically required her to "take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." IIRIRA § 102(a), 110 Stat. 3009-554. Section 102(c) provided that the provisions of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, "are waived to the extent the Attorney General determines necessary to ensure expeditious construction of the barriers and roads under this section." 110 Stat. 3009-555.

When it created the Department of Homeland Security (DHS), Congress transferred the Attorney General's powers and duties to "control and guard the boundaries and borders of the United States against the illegal entry of aliens" to the Secretary of Homeland Security (Secretary). 8 U.S.C. 1103(a)(1) and (5) (2000 & Supp. V 2005); see also 6 U.S.C. 251 and 291 (Supp. V 2005).

In 2005, Congress amended several federal laws with the declared purpose of "protect[ing] against terrorist

entry." REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, 119 Stat. 302. One of those amendments expanded the scope of Section 102(c) of IIRIRA, which had authorized the waiver of two federal environmental statutes if necessary to ensure expeditious construction of barriers and roads at the border. That waiver provision now reads as follows:

> Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

IIRIRA § 102(c)(1), as amended, 119 Stat. 306.

Congress also provided for limited and streamlined judicial review of such waivers. A federal district court may hear a claim arising from the Secretary's exercise of the waiver authority, but only if the claim "alleg[es] a violation of the Constitution of the United States"; the claim must be brought within 60 days after the waiver; and any district court decision is reviewable only through a writ of certiorari from this Court. IIRIRA § 102(c)(2)(A)-(C), as amended, 119 Stat. 306.

In the Secure Fence Act of 2006, Congress imposed additional obligations on the Secretary with regard to border security. Among other things, it gave the Secretary 18 months to take "all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States," through both border surveillance and "physical infra-

structure enhancements." Pub. L. No. 109-367, § 2(a), 120 Stat. 2638. Congress defined "operational control" as "the prevention of *all unlawful entries* into the United States." § 2(b), 120 Stat. 2638 (emphasis added).[1]

2. The Bureau of Land Management (BLM) manages the San Pedro Riparian National Conservation Area (SPRNCA), which comprises approximately 58,000 acres in Arizona, near the San Pedro River. Pet. App. 1a-2a. In fall 2007, acting pursuant to NEPA, BLM completed an environmental assessment, concluding that proposed border fencing in the SPRNCA would not have a significant impact on the environment. *Id.* at 2a. BLM granted a right of way to DHS for the construction of a section of border fencing within the SPRNCA, and the Army Corps of Engineers, acting on behalf of DHS, began constructing fences, an accompanying road, and drainage structures along the United States border with Mexico within the SPRNCA. The relevant portion of the fence runs along just under 10,000 feet of the border. *Id.* at 2a n.1.

3. a. On October 5, 2007, petitioners filed this case, seeking an injunction barring construction of the SPRNCA fence based on alleged violations of NEPA, the Arizona-Idaho Conservation Act of 1988 (AICA), 16 U.S.C. 460xx *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* See Pet. App. 2a-3a. At a hearing five days later, the district court granted a temporary restraining order, finding that petitioners had demonstrated a likelihood of success with respect to their NEPA claims. *Id.* at 3a. In response to the court's order, the construction of, and activities related to the

[1] Section 3 of the Secure Fence Act amended Section 102(b) of IIRIRA by expanding the number of places where Congress expressly directed that the Secretary erect border fencing. 120 Stat. 2638-2639.

construction of, all border walls, fences, and roads within the SPRNCA were halted. *Ibid.*

b. With construction thus halted by petitioners' lawsuit—and with an average of 52 aliens illegally coming across the border within the SPRNCA every day—the Secretary exercised his waiver authority under Section 102(c) of IIRIRA.[2] On October 26, 2007, he published in the *Federal Register* his decision to waive, with respect to the construction of the SPRNCA fence, the three statutes that formed the basis for petitioners' lawsuit (NEPA, the AICA, and the APA) and 17 other specific federal statutes that can restrict land uses. 72 Fed. Reg. 60,870; see also Pet. App. 5a n.4 (listing waived statutes). In that decision, the Secretary set forth his determinations that the relevant area is an area of high illegal entry, that there is a need to construct fixed and mobile barriers and roads in the vicinity of the border, and that the waiver was "necessary" to "ensure the expeditious construction of the barriers and roads that Congress prescribed * * * in the area starting approximately 4.75 miles west of the Naco, Arizona Port of Entry to the western boundary of the SPRNCA and any and all land covered by the TRO [in this case]." 72 Fed. Reg. at 60,870.

Upon being notified of the publication of the Secretary's waiver decision, the district court vacated its temporary restraining order on October 26, 2007. Pet. App. 5a-6a.

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[2] As counsel for the government explained at the TRO hearing, there were 19,000 apprehensions of illegal entrants in the SPRNCA in fiscal year 2007, which, at an average of 52 persons a day, meant that a 20-day delay in construction to allow for the briefing of a preliminary injunction would permit at least 1,040 additional illegal entrants into the country. 10/10/2007 Tr. 85.

4. The government then moved to dismiss this action in district court, contending that the Secretary's waiver had rendered the statutes giving rise to the action inapplicable and thus divested the district court of jurisdiction. Petitioners responded by asserting that the statutory waiver provision was an unconstitutional Executive repeal of duly enacted statutes and an unconstitutional delegation of legislative authority to the Secretary. The district court granted the government's motion to dismiss. Pet. App. 1a-20a.

a. The district court first held that, contrary to petitioners' assertions, the waiver provision "is not equivalent to the partial repeal or amendment at issue in *Clinton* [v. *City of New York*, 524 U.S. 417 (1998)]." Pet. App. 8a. It explained that, in *Clinton*, the line items cancelled by the President under the Line Item Veto Act of 1996, 2 U.S.C. 691 *et seq.*, would not have had any legal force or effect under any circumstance, but that a waiver under Section 102(c) of IIRIRA does not similarly invalidate any law or statutory provision. Instead, the waiver in this case simply makes the specified provisions inapplicable to a particular border-barrier project. Pet. App. 8a-9a. The district court noted that there are "myriad examples" in which Executive Branch officials may waive specific applications of laws, and that petitioners did not argue that such waiver provisions are all unconstitutional. *Id.* at 9a-10a. The court also noted that the waiver provision here implements Congress's directive that border barriers be constructed expeditiously, while the line-item veto at issue in *Clinton* involved the Executive's specific rejection of Congress's own policy judgments and the implementation of contrary Executive policies in their place. *Id.* at 11a. Finally, it noted that the waiver here, unlike the line-item

veto, involves "foreign affairs and immigration control" —areas over which the Executive has traditionally exercised a large degree of discretion. *Id.* at 12a.

b. The district court also rejected petitioners' argument that the statutory waiver authorization is an unconstitutional delegation of legislative authority. Pet. App. 13a-19a. The district court followed this Court's precedents holding that the Constitution permits Congress to grant authority to the Executive so long as "Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Id.* at 14a (quoting *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989)). The court held that the waiver authority here satisfies that intelligible-principle requirement because Section 102(c) clearly delineates the general policy the Secretary must implement (the expeditious installation of border barriers) and clearly defines the limits of that authority by allowing waiver only when "necessary to ensure expeditious construction." *Ibid.* The court rejected petitioners' contention that the waiver provision is unconstitutionally broad because it allows for waiver of all legal requirements to the extent necessary to ensure expeditious construction, rather than just specifically designated laws. *Id.* at 16a-18a. Similarly, the court noted that broader grants of authority are permissible in areas where the Executive already has significant independent constitutional authority, such as immigration and foreign affairs. *Id.* at 18a-19a.

c. After their suit was dismissed, petitioners filed no request for any form of stay or injunctive relief, and, as

petitioners note (Pet. 11 n.4), construction of the barriers has since been completed.[3]

[3] Petitioners assert (Pet. 11 n.4) that the case has not become moot because, if the Secretary's waiver is invalidated, they could still "seek effective remedies" under "NEPA and other laws" to "mitigate or avoid the harms threatened by the fence." They cite no authority for that assertion, and it is not clear what relief they could properly receive—especially under NEPA, which is a purely procedural statute that does not mandate any substantive outcome in agency decisionmaking, see *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), but instead governs matters to be considered in connection with a proposed action. Once the proposed action has been approved and the on-the-ground activity completed, there is no remaining federal action to which any further NEPA obligation could attach. See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 72-73 (2004); see also *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 371-374 (1989) (explaining that NEPA may require the preparation of a supplemental environmental impact statement only so long as "there remains major Federal action to occur") (internal quotation marks and alteration omitted); *One Thousand Friends* v. *Mineta*, 364 F.3d 890, 893 (8th Cir. 2004) (holding NEPA challenge to a completed project moot because NEPA's purpose is to "ensur[e] that the review process is followed correctly by federal agencies, not to second-guess design decisions"); *Richland Park Homeowners Ass'n* v. *Pierce*, 671 F.2d 935, 941 (5th Cir. 1982) (explaining that NEPA is not intended to "serve as a basis for after-the-fact critical evaluation subsequent to substantial completion of the construction"); but cf. *Oregon Natural Res. Council* v. *United States BLM*, 470 F.3d 818, 821-822 (9th Cir. 2006) (holding that some "effective relief" remained under NEPA challenge to timber-harvesting project because certain post-harvest activities remained to be completed).

Petitioners have also raised claims under the AICA, which, in contrast to NEPA, does impose substantive obligations on the Secretary of the Interior to "manage" the SPRNCA "in a manner that conserves, protects, and enhances the riparian area and the * * * resources of the conservation area" and to "allow" only those uses of the conservation area that "further the primary purposes" for which it was established. 16 U.S.C. 460xx-1(a) and (b). Thus, there may be some possibility of future relief if the Secretary's waiver were invalidated and peti-

ARGUMENT

The decision of the district court is correct and does not conflict with any decision of this Court or any other court. This Court's review is therefore not warranted.

1. a. As an initial matter, there is no split of authority with respect to the Secretary's exercise of waiver authority under Section 102(c) of IIRIRA. Three courts (including the district court in this case) have addressed constitutional challenges to the waiver provision, and all three have upheld the provision's constitutionality. See Pet. App. 1a-20a; *Save Our Heritage* v. *Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008); *Sierra Club* v. *Ashcroft*, No. 04CV0272-LAB, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 12, 2005).[4] That unanimity is unsurprising in light of this Court's prior decisions, which, as discussed below, establish that the waiver is not an unconstitutional delegation of legislative power.

Petitioners contend that the decision below conflicts with court of appeals decisions "holding that the availability of judicial review is essential to satisfy the 'intelligible principle' standard." Pet. 3; accord Pet. 10. But this Court vacated the only decisions petitioners cite that invalidated statutory provisions on unconstitutional delegation grounds because of the unavailability of judicial review. See Pet. 15-16 (citing *South Dakota* v. *Department of the Interior*, 69 F.3d 878, 881 (8th Cir. 1995), vacated, 519 U.S. 919 (1996); *United States* v.

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tioners' AICA claim were ultimately held to be meritorious. That possibility appears to prevent petitioners' constitutional claim—the only one at issue in this Court—from being moot at this point.

[4] There are of course no court of appeals decisions on point because district court decisions concerning the constitutionality of a Section 102(c) waiver are reviewable only by this Court. IIRIRA § 102(c)(2)(C), as amended, 119 Stat. 306.

Widdowson, 916 F.2d 587, 591 (10th Cir. 1990), vacated, 502 U.S. 801 (1991)). Other decisions merely suggest that the existence of judicial review is a factor to be considered in determining whether an unconstitutional delegation of legislative power has taken place. *E.g.*, *United States* v. *Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994). And in the most relevant decision, the Ninth Circuit specifically rejected the argument that "a delegation of legislative power that is statutorily exempt from judicial review violate[s] the nondelegation doctrine." *United States* v. *Bozarov*, 974 F.2d 1037, 1041-1045 (1992), cert. denied, 507 U.S. 917 (1993).

b. Petitioners assert (Pet. 25) that this Court's review is somehow "[n]ecessitate[d]" by Congress's decision to shorten the process of judicial review of Section 102(c) waivers. To the contrary, the unusual—but not unique, see 43 U.S.C. 1652(d)—decision by Congress to bypass the courts of appeals and yet to provide for this Court's review only via certiorari rather than appeal as of right strongly reinforces what is in any event obvious from the terms of Section 102 as a whole: Congress wanted "expeditious construction" of border barriers in "areas of high illegal entry" to take priority over the normal operation of other federal statutes and the long delays often associated with litigation. IIRIRA § 102(a), 110 Stat. 3009-554; § 102(c)(1), as amended, 119 Stat. 306; see also § 102(c)(2)(B), as amended, 119 Stat. 306 (requiring waivers to be challenged within 60 days). The special statutory framework therefore weighs heavily against discretionary review of a district court decision sustaining the constitutionality of a waiver, at least in the absence of extraordinary circumstances that are wholly lacking here.

Given the absence of any conflict about the constitutionality of Section 102(c) of IIRIRA, the completion of the segment of border fence at issue, and Congress's concern for speedy termination of such disputes, this case falls short of having any special claim to this Court's discretionary certiorari jurisdiction. Indeed, a grant of certiorari in this case, at a time when the Secretary is under a statutory obligation to achieve operational control over the Nation's borders within a matter of months, see pp. 3-4, *supra*, would be far more likely to "create[] uncertainty" (Pet. 28) about the use of the waiver authority than has the current unanimity among lower courts.[5]

2. a. The district court's decision with respect to the nondelegation doctrine follows the firmly established precedent of this Court. The Constitution permits Congress to grant decisionmaking authority to Executive Branch officials as long as it provides "an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928); accord, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *Loving* v. *United States*, 517 U.S. 748, 771

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[5] Petitioners also make a glancing reference (Pet. 16-17) to federalism concerns, but their lawsuit, which arose exclusively under three federal statutes, is obviously an inappropriate vehicle for evaluating the effects of the Secretary's waiver on state and local laws. The waiver at issue in this case also fails to present anything remotely resembling the parade of horribles conjured by the amici law professors. See Araiza Amicus Br. 11 (suggesting that the Secretary might, in the future, waive laws not tied to land use, such as federal labor and workplace safety laws, or state speed limits). To date, the waivers issued by the Secretary have focused on statutes that have implications for land use. See 73 Fed. Reg. 19,080 (2008); *id.* at 19,077-19,078; 72 Fed. Reg. 60,870 (2007); *id.* at 2535-2536; 70 Fed. Reg. 55,623 (2005).

(1996); *Touby* v. *United States*, 500 U.S. 160, 165 (1991); *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). As this Court has repeatedly observed, it has found only two statutes that lacked the necessary "intelligible principle." *Whitman*, 531 U.S. at 474 (referring to *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388 (1935)); *Loving*, 517 U.S. at 771 (same); *Mistretta*, 488 U.S. at 373 (same); see also *id.* at 416 (Scalia, J., dissenting) (explaining that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

To provide a constitutionally sufficient "intelligible principle," Congress need only "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). The waiver provision in Section 102(c) of IIRIRA readily meets that test. Congress has clearly delineated the general policy, namely "to ensure expeditious construction of the barriers and roads under this section," IIRIRA § 102(c)(1), as amended, 119 Stat. 306, which are, by definition, "in the vicinity of the United States border," and are erected "to deter illegal crossings in areas of high illegal entry into the United States," § 102(a), 110 Stat. 3009-554. Congress has clearly identified the Secretary as the public agency who is to apply the standard. And Congress has established the boundaries of the delegated authority by permitting a waiver only for construction along the border and only when "necessary to ensure expeditious construction of the barriers and roads under" Section 102. § 102(c)(1), as amended, 119 Stat. 306.

These limitations are more than adequate to provide the constitutionally requisite guide for the Secretary's actions, and, indeed, provide considerably more focused direction than other limitations that this Court has sustained against nondelegation challenges.[6]

b. Although there can be little doubt that Section 102(c) satisfies the usual test, "the same limitations on delegation" do not even apply in a case like this, in which "'the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" *Loving*, 517 U.S. at 772 (quoting *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975)). Here, the Executive Branch possesses independent authority over

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[6] See, *e.g.*, *Whitman*, 531 U.S. at 472 (upholding authorization for EPA to set air quality standards "the attainment and maintenance of which in the judgment of the Administrator * * * are requisite to protect the public health") (quoting 42 U.S.C. 7409(b)(1)); *Touby*, 500 U.S. at 163 (upholding grant to the Attorney General of authority to amend the threshold for criminal liability by adding a drug temporarily to the statutory list of controlled substances if "necessary to avoid an imminent hazard to the public safety") (quoting 21 U.S.C. 811(h)); *American Power & Light*, 329 U.S. at 104 (upholding grant to SEC of authority to modify the structure of holding company systems to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders") (quoting § 11(b)(2) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79k(b)(2)); *Yakus* v. *United States*, 321 U.S. 414, 420 (1944) (upholding grant to Executive of authority to fix maximum commodity prices that "will be generally fair and equitable and will effectuate the purposes of this Act") (quoting § 2(a) of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 24 (repealed 1966)); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-226 (1943) (upholding exercise of authority based on a "public interest" standard); see also *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting) ("What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld * * * a 'public interest' standard?").

the subject matters related to border barriers, namely immigration and foreign relations. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'") (citations omitted); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950) ("The right to [exclude aliens] * * * is inherent in the executive power to control the foreign affairs of the nation."). Those considerations are, of course, at their zenith with respect to security at the very borders of the Nation.

Thus, it is not surprising that petitioners do not argue that the statutory waiver provision fails, per se, to provide a sufficiently intelligible principle.

3. Petitioners instead assert that the intelligible-principle test should include an additional element; they contend that Congress cannot confer decisionmaking authority on the Executive unless it provides both an intelligible principle *and* judicial review of the Executive's compliance with the statutory standard. See Pet. 3 (arguing that "[t]he absence of judicial review here is * * * fatal * * * under the nondelegation doctrine"); Pet. 19 ("judicial review is an essential element of [the intelligible-principle] standard"). That assertion is contrary to this Court's previous decisions, and, with the exception of decisions vacated by this Court (see pp. 9-10, *supra*), petitioners cite no decision by any court holding that judicial review for statutory compliance is invariably necessary for a conferral of authority on the Executive Branch to be constitutional.

Indeed, petitioners' position on this issue has evolved during this litigation. Before the district court, petition-

ers asserted that the statutory limitation on judicial review merely helped illustrate why (in their view) the waiver provision fails to provide sufficient restraints on the Secretary's exercise of authority to satisfy the "intelligible principle" standard. Pet. D. Ct. Opp. to Resp. Renewed Mot. to Dismiss 31. Before this Court, however, petitioners and the amici supporting them take a new, more absolute, position that was neither pressed nor passed upon in the court below, namely that "a delegation of authority can satisfy the 'intelligible principle' standard *only* if the Executive's actions are subject to judicial review." Pet. 3 (emphasis added); see also Fourteen Members of the House of Reps. Amicus Br. 23; Araiza Amicus Br. 12-19.

A similar argument was raised in *Touby*, but the majority of the Court—unlike the opinion of Justice Marshall quoted by petitioners and the amici law professors, Pet. 14; Araiza Amicus Br. 13—did not announce any such rule, concluding instead that it was sufficient that the statutory scheme at issue there, which imposed criminal sanctions for a violation, allowed a criminal defendant to challenge the administrative decision while defending himself against a prosecution. See *Touby*, 500 U.S. at 168-169. Even Justice Marshall's explanation of the need for judicial review in *Touby* depended on the fact that the administrative standard in question was enforceable "by criminal law"—implicating a species of personal rights that is not relevant in this case—and cited a passage in *Webster* v. *Doe*, 486 U.S. 592, 603-604 (1988), that preserved judicial review in a non-criminal context only for constitutional claims. See 500 U.S. at 170 (Marshall, J., concurring).

a. Petitioner's theory is not supported by the constitutional underpinnings of the nondelegation doctrine.

The doctrine derives from the vesting of specific "legislative Powers" in Congress. See U.S. Const. Art. I, § 1. Accordingly, "the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman*, 531 U.S. at 472; accord *Loving*, 517 U.S. at 771 (explaining that the doctrine derives from "the understanding that Congress may not delegate the power to make laws"). The judiciary's role (if any) is separate from the answer to that question. Whether or not a given power is "legislative" or constitutes "the power to make laws" under our Constitution has nothing to do with whether the exercise of that power is subject to judicial (or any other) review.

b. Petitioners' legal argument also cannot be reconciled with this Court's application of the intelligible-principle test as a one-step inquiry. In cases specifically addressing nondelegation arguments, it has been clear that the only constitutional requirement is that Congress *provide* an intelligible principle for the Executive. Indeed, that has been true since the Court first announced the test in the following terms: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton*, 276 U.S. at 409. According to the plain terms of that test, the only constitutional requirements are that Congress "lay down" the "intelligible principle" and "direct[]" the agency to conform to it, *not* that Congress also provide for judicial review as a mechanism by which compliance will be enforced. More recent decisions have repeated that clear formulation of the test, which stresses the establishment of a standard for the Executive to apply, without mentioning judicial application.

See, *e.g.*, *Touby*, 500 U.S. at 165 (quoting *J.W. Hampton*, 276 U.S. at 409); *Mistretta*, 488 U.S. at 372 (same); *Federal Energy Admin.* v. *Algonquin, SNG, Inc.*, 426 U.S. 548, 559 (1976) (same); *Lichter* v. *United States*, 334 U.S. 742, 785 (1948) (same); see also *Carlson* v. *Landon*, 342 U.S. 524, 544 (1952) ("This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards."); *Whitman*, 531 U.S. at 489-490 (Stevens, J., concurring) ("As long as the delegation *provides* a sufficiently intelligible principle, there is nothing inherently unconstitutional about it.") (emphasis added).

Nonetheless, petitioners assert (Pet. 3) that this Court has required the existence of an intelligible principle precisely so it can be applied during the exercise of judicial review, from which they infer that judicial review must be constitutionally required. For that proposition, they rely on *Yakus* v. *United States*, 321 U.S. 414, 426 (1944), and cases that have quoted or paraphrased it.[7] But *Yakus* actually implies just the opposite:

> The standards prescribed by the present Act, with the aid of the 'statement of considerations' required to be made by the Administrator, are sufficiently definite and precise to enable *Congress, the courts and the public* to ascertain whether the Administrator, in fixing the designated prices, has conformed

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[7] Petitioners (Pet. 12-13) also quote *Skinner* v. *Mid-American Pipeline Co.*, 490 U.S. 212, 218 (1989), for the proposition that judicial review is required, but the statements about judicial review in *Skinner* reflect the fact that judicial review was, in fact, available in that case. At any rate, they trace back through *Mistretta* to *Yakus* as their ultimate source. As explained in the text, *Yakus* is contrary to petitioners' suggestion that the purpose of the intelligible-principle test is to facilitate judicial review.

> to those standards. Hence we are unable to find in them an unauthorized delegation of legislative power.

Id. at 426 (emphasis added; citation omitted); accord *Opp Cotton Mills, Inc.* v. *Administrator of the Wage & Hour Div. of the Dep't of Labor*, 312 U.S. 126, 144 (1941). As the fuller quotation makes clear, this Court has understood the purpose of the intelligible-principle test as facilitating accountability generally, rather than focusing on providing a framework for courts when they have a role in reviewing the agency's action. Thus, the intelligible-principle requirement also serves to ensure the availability of information to Congress and the public to facilitate political remedies when an agency violates statutory standards. See *Bozarov*, 974 F.2d at 1041 (concluding that the better argument is that "the purpose of an intelligible principle is simply to channel the discretion of the executive and to permit Congress to determine whether its will is being obeyed," rather than "to permit a court to ascertain whether the will of Congress has been obeyed"). That is, of course, consistent with the numerous instances in which there is no judicial review of Executive action implementing statutory delegations.

At bottom, petitioners' argument conflates two distinct questions: (1) whether an Act of Congress is constitutionally infirm because it cedes legislative authority to the Executive Branch by failing to impose sufficient restrictions; and (2) whether the Executive Branch has adhered to the restrictions imposed by the statute. The first question is the standard nondelegation inquiry, which is encompassed within the jurisdiction provided by Section 102(c)(2)(A) of IIRIRA to determine a waiver's constitutionality. By contrast, the second ques-

tion is simply whether the Executive acted *ultra vires* by violating a statute's terms. Petitioners suggest that the nondelegation doctrine requires review of both questions. But the Executive's compliance with statutory criteria, the second question, is not always subject to judicial review even now, and certainly was not historically—especially at the behest of plaintiffs, such as petitioners here, who do not assert that they have any independent property rights of their own that are adversely affected by the government's construction activities but instead rely on general environmental interests in the way the government manages *its* property. See First Am. Compl. ¶¶ 7-10.

Indeed, judicial review is the exception where it is not provided for by the APA, which did not exist until long after the nondelegation doctrine had been recognized, and which still does not apply, for example, to decisions of the President, see *Franklin* v. *Massachusetts*, 505 U.S. 788, 801 (1992), or to any decision that is committed to agency discretion or with regard to which judicial review would be inconsistent with the statutory scheme. See 5 U.S.C. 701(a)(1) and (2); see also, *e.g.*, *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 130-133 (1988) (holding that "prosecutorial" decisions of the General Counsel of the NLRB are not subject to judicial review, in part because review "would involve lengthy judicial proceedings in precisely the area where Congress was convinced that speed of resolution is most necessary").

Petitioners claim that "[j]udicial review is the *only* effective means of ensuring that Congress's restrictions are obeyed," Pet. 12, but they overlook the fact that many decisions are, by their nature, not subject to judicial review, and that political checks exist if the Execu-

tive exceeds the limits of a valid statute. If Congress believes that the Secretary's waiver in this case was overbroad or, as petitioners briefly suggest (Pet. 28-29), that it was not actually necessary to the expeditious construction of a border barrier in an area of high illegal entry, it can repeal or modify the waiver authority in IIRIRA, specify that NEPA or other laws are applicable to the relevant portion of the border fence, require alternative procedures in lieu of other statutes, or employ a variety of political tools to exert pressure on the Executive.[8]

c. Despite its many decisions approving grants of authority by Congress to the Executive without judicial review for statutory compliance, this Court has not suggested that the absence of such review creates a constitutional difficulty.[9] Yet, under petitioners' submission,

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[8] The Secretary's compliance with most of the statutory criteria for a waiver under IIRIRA is essentially uncontested. There is no dispute that the fence at issue is "in the vicinity of the United States border," in an "area[] of high illegal entry into the United States," and that it was installed "to deter illegal crossings." IIRIRA § 102(a), 110 Stat. 3009-554. Petitioners question (Pet. 29) whether a waiver of NEPA was "necessary" by noting that the Secretary has allowed environmental impact statements to be prepared for other (and longer) sections of border fence. But it is clear beyond cavil that the waiver of NEPA allowed the fence within the SPRNCA to be constructed more expeditiously. Before the Secretary exercised the waiver, construction was halted by a court order based upon NEPA. After the waiver, it was possible to complete construction.

[9] Petitioners claim (Pet. 14-15) that *A.L.A. Schechter Poultry Corp.* made "[t]he absence of judicial review" a factor in its nondelegation analysis. Although the Court mentioned judicial review in explaining how the National Industrial Recovery Act differed from the Federal Trade Commission Act "not only in procedure but in subject matter," 295 U.S. at 533-534, the presence or absence of judicial review made no appearance at all in the five pages of the opinion that actually discussed

in each of those cases, this Court approved an unconstitutional delegation. For example, in *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948), the Court held that judicial review was not available for a decision by the Civil Aeronautics Board, with the approval of the President, to grant one entity (and deny another) the right to fly specified routes between the United States and foreign countries. *Id.* at 114. The authority to grant that right had been conferred by Congress through legislation, and this Court noted that it was irrelevant whether the authority was viewed as legislative or executive in origin because "Congress may of course delegate very large grants of its power over foreign commerce to the President." *Id.* at 109 (citing *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294 (1933)). In short, this Court concluded that the statutory authorization was valid despite the absence of judicial review. That holding forecloses petitioners' contrary argument.

Similarly, in *Knauff*, this Court upheld the statutory grant of authority to the President, delegated to the Attorney General, to impose restrictions and prohibitions on persons' entry into and departure from the United States when he determined that the public interest of the United States so required. 338 U.S. at 543-544. The Court concluded that Congress's broad authorization was constitutionally acceptable, despite the fact that the Executive's exclusion decisions applying that standard were not subject to judicial review. *Id.* at 543.

There are many other examples of this Court's approval of statutes that confer broad authority on the

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whether Congress had "delegate[d] legislative power to the President." *Id.* at 537-542.

Executive in the absence of judicial review. For example, in *Franklin*, Congress created a detailed scheme for the decennial census, at the culmination of which the President was to report to Congress on the population of each State and the number of Representatives in the House of Representatives to which it would then be entitled. The Court made clear that the President's duty in this regard was not "ministerial," 505 U.S. at 800, and that he was to exercise statutory authority to make "policy judgments" regarding the census, *id.* at 799. Nevertheless, it held that the President's exercise of that authority was subject to judicial review only for constitutional violations and not for any failure to comply with statutes, *id.* at 801—which mirrors the result prescribed by the statutory limits on judicial review in this case. If petitioners were correct, the statute at issue in *Franklin* was unconstitutional.

The same is true of *Dalton* v. *Specter*, 511 U.S. 462 (1994), in which this Court addressed a statute granting the President the uncircumscribed authority to approve or disapprove a list of military bases to be closed. See *id.* at 470. The Court concluded that statutory judicial review of the President's decision was not available. *Id.* at 476.

In *Lincoln* v. *Vigil*, 508 U.S. 182 (1993), the Court considered a statute that appropriated funds to the Indian Health Service to spend "for the benefit, care, and assistance of the Indians," 25 U.S.C. 13. The Court concluded that the Indian Health Service's decision regarding what programs to fund was not judicially reviewable under the APA. 508 U.S. at 193-194. The opinion contains no hint that the absence of judicial review meant that the statute effected an unconstitutional delegation.

Petitioners acknowledge (Pet. 17-19) the existence of cases in which this Court has approved statutory authorizations for Executive Branch officials and agencies without judicial review, but suggest that has occurred only in "narrow situations," Pet. 19, "where the actions in question fall within the inherent authority of the Executive Branch," and there is "no law to apply," purportedly making the "intelligible principle" test irrelevant, Pet. 18. That suggestion is contrary to decisions of this Court, including those described above, which are not confined to "narrow situations," exercises of inherent authority, and the existence of "no law to apply." As an additional example, in *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), the law to be applied was NEPA—one of the laws that forms the basis of petitioners' complaint here. The plaintiffs challenged a rate decision by the Interstate Commerce Commission (ICC) on the ground that it "had failed to include a detailed environmental impact statement as required by * * * NEPA." *Id.* at 679. This Court held that the ICC's decision was not subject to judicial review, even though NEPA provides legal standards that could have been applied to the decision. *Id.* at 698-699.

Thus, this Court's decisions do not support petitioners' contention that statutory grants of authority that contemplate the exercise of discretion are unconstitutional unless the Executive's actions are subject to judicial review.

4. In the second question presented, petitioners contend that the Secretary's waiver is unconstitutional because it "repeal[s]" previously enacted statutes without going through the process of bicameralism and presentment to the President. Pet. i, 21. That argument de-

pends entirely on petitioners' contention that the Secretary's waiver "has amended * * * Acts of Congress by repealing a portion of each." Pet. 20 (quoting *Clinton* v. *City of N.Y.*, 524 U.S. 417, 438 (1998)). But IIRIRA's waiver is materially similar to common and constitutionally sound waiver provisions and dramatically different from the line-item veto invalidated in *Clinton*.

Petitioners concede (Pet. 21) that it can be constitutional for Congress to authorize the Executive to waive some applications of a statute. That concession is compelled by this Court's decision in *Field* v. *Clark*, 143 U.S. 649 (1892), which upheld just such a measure,[10] and noted that similar provisions date back to at least 1799.[11]

The problem with the line-item veto in *Clinton*, by contrast, was that it authorized the Executive to "cancel" a previously enacted law and thereby deprive it of "legal force or effect." 524 U.S. at 437 (quoting the Line Item Veto Act, 2 U.S.C. 691e(4)(B)-(C)). That is not what waiver provisions do. Instead, waiver provisions allow the Executive to waive the application of existing

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[10] The statute at issue in *Field* gave the President the "power" and "duty" to "suspend" specified provisions of a statutory tariff "for such time as he shall deem just," "whenever, and so often as the President shall be satisfied that the government of any country * * * imposes duties or other extractions upon the agricultural or other products of the United States, which * * * he may deem to be reciprocally unequal and unreasonable." 143 U.S. at 680 (quoting Act of Oct. 1, 1890, ch. 1244, § 3, 26 Stat. 612).

[11] The Court referred to a statute authorizing the President "to remit and discontinue * * * the restraints and prohibitions which Congress had prescribed with respect to commercial intercourse with the French Republic, 'if he shall *deem* it expedient and consistent with the interest of the United States,' and 'to revoke such order, whenever, in his opinion, the interest of the United States shall require.'" 143 U.S. at 691 (quoting Act of Feb. 9, 1799, ch. 2, § 4, 1 Stat. 615).

laws in one or more particular situations, while leaving them otherwise fully applicable.

As the district court correctly recognized, Pet. App. 10a-12a, the waiver provision in Section 102(c) of IIRIRA has the salient characteristics of the waiver at issue in *Field* (and in numerous other statutes) and lacks the key characteristic of the provision at issue in *Clinton*. NEPA and each of the other statutes whose application was waived by the Secretary retain full "legal force and effect" for all projects and all places except where the Secretary has determined that a condition stated by Congress has been satisfied. They are inapplicable only with respect to the construction of barriers and roads along the relevant portion of the border with Mexico. The same would be true of any other statutes that the Secretary might decide to waive under Section 102(c); they would retain their general legal force and effect, because the Secretary's waiver authority extends to only a tiny fraction of the universe of cases to which NEPA and similar statutes apply. That is the constitutionally dispositive difference between IIRIRA and the Line Item Veto Act.

There are also profound differences for separation-of-powers purposes between the line-item veto at issue in *Clinton* and statutory waivers like the ones at issue in *Field* and here. In *Clinton*, this Court was concerned that the President's exercise of the line-item veto "necessarily was based on the same conditions that Congress evaluated when it passed [the appropriations being 'cancelled']," and that, by issuing such a veto, the President was "rejecting the policy judgment made by Congress and relying on his own policy judgment." 524 U.S. at 443, 444. The Court emphasized that, because only a few days could elapse between the appropriation stat-

ute's enactment and the issuance of any line-item veto, the veto could not be based on anything but a policy disagreement with the very enactment of the law, rather than circumstances that had arisen after enactment. *Ibid.*

Here, by contrast, the Secretary acted consistent with, rather than contrary to, Congress's policy judgment, based on circumstances he confronted in the operation of the law. Congress enacted (and later expanded) the provision in IIRIRA authorizing the waiver of NEPA and other statutes "to ensure the expeditious construction" of border barriers. IIRIRA § 102(c)(1), as amended, 119 Stat. 306. In so doing, Congress unmistakably expressed its policy judgment that construction of the barriers and roads along the border was of such importance that it justified waiving application of environmental and other laws to the extent those laws threaten expeditious construction. Thus, in sharp contrast to *Clinton*, there is no question that the Secretary is executing (rather than rejecting) the will of Congress.

To avoid the controlling holding of *Field*, petitioners allege (Pet. 21-22) that there are three differences between the waiver at issue here and the one upheld in *Field*—namely that the waiver authority here is (1) broader (in that it includes the authority to waive requirements of multiple statutes), (2) "free standing" (meaning that one statute authorizes the Executive to waive the requirements of a different statute), and (3) not subject to judicial review. But petitioners do not explain why any of these differences matter, and, in fact, none of them does.

As explained above, the question here is whether a statute includes an unconstitutional repeal (like the line-item veto) or a constitutional waiver provision (like the

presidential waiver in *Field*). Whether that provision applies to one statute or more is irrelevant, and, indeed, Congress often authorizes waiver of multiple statutes.[12] Second, from a constitutional perspective, whether the waiver provision is part of the statute whose terms can be waived or part of a different statute is irrelevant. Congress's constitutional authority does not depend on whether it acts through a single bill or multiple bills, because every bill, once enacted, is a "Law" with its own operative force. See U.S. Const. Art. I, § 7, Cl. 2. Thus, Congress has often provided in one statute that application of a separate statute could be waived. That was true in the early years of this Nation, see *Field*, 143 U.S.

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[12] Petitioners admit (Pet. 23) that a number of statutes expressly allow for the waiver of multiple statutory provisions. See, *e.g.*, 10 U.S.C. 433(b) (waiver of "Federal laws or regulations pertaining to the management and administration of Federal agencies"); 10 U.S.C. 2350b(c) (waiver, with respect to contract, of "any provision of law," other than two specified laws, that prescribes contractual procedures or requirements); 10 U.S.C. 2671(b) (Supp. V. 2005) (waiver or modification of "the fish and game laws of a State"); 25 U.S.C. 3406 (authorizing "Secretary of each Federal agency providing funds" for program to waive "any statutory requirement, regulation, policy, or procedure promulgated by that agency"); 43 U.S.C. 1652(c) (authorizing Secretary of the Interior and other federal officials and agencies to "waive any procedural requirements of law or regulation which they deem desirable to waive in order to accomplish the purposes of [the Trans-Alaska Pipeline Authorization Act]"); Act of Oct. 6, 2006, Pub. L. No. 109-304, § 4, 120 Stat. 1490 (to be codified at 46 U.S.C. 501(a)) (waiver of "navigation or vessel-inspection laws * * * to the extent the Secretary considers necessary in the interest of national defense"); Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 5107(a)(2), 120 Stat. 42 (providing for waiver of "such provisions of law * * * as are necessary to implement [specified statutory provision] on a timely basis"); Indian Health Care Amendments of 1988, Pub. L. No. 100-713, § 601(b), 102 Stat. 4826 (25 U.S.C. 1661 note) (authorizing waiver of "the Indian preference laws").

at 685 (citing the "act of December 19, 1806," authorizing the President to suspend the operation of a prior act), and remains true today.[13] Third, it is not at all clear that the President's exercise of the waiver authority in *Field* was subject to greater judicial review than the waiver authorized here. Cf. *Franklin*, 505 U.S. at 801 (reviewing President's actions "for constitutionality" but not "for abuse of discretion under the APA"). But even if the waiver in *Field* had been subject to greater judicial review than the waiver here, that fact would have no bearing on the relevant question—whether the waiver is an unconstitutional statutory repeal. That question is wholly separate from what degree of judicial review is available.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13] Indeed, each statute listed in the preceding footnote provides for the waiver of one or more previously enacted statutory provisions.

APPENDIX

Section 102(a)-(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-554 to 3009-555, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 102, 119 Stat. 306, and the Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, provides as follows:

(a) IN GENERAL.—The Attorney General, in consultation with the Commissioner of Immigration and Naturalization, shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.

(b) CONSTRUCTION OF FENCING AND ROAD IMPROVEMENTS IN THE BORDER AREA.—

(1) SECURITY FEATURES.—

(A) REINFORCED FENCING.—In carrying out subsection (a), the Secretary of Homeland Security shall provide for least [*sic*] 2 layers of reinforced fencing, the installation of additional physical barriers, roads, lighting, cameras, and sensors—

(i) extending from 10 miles west of the Tecate, California, port of entry to 10 miles east of the Tecate, California, port of entry;

(ii) extending from 10 miles west of the Calexico, California, port of entry to 5 miles east of the Douglas, Arizona, port of entry;

(iii) extending from 5 miles west of the Columbus, New Mexico, port of entry to 10 miles east of El Paso, Texas;

(iv) extending from 5 miles northwest of the Del Rio, Texas, port of entry to 5 miles southeast of the Eagle Pass, Texas, port of entry; and

(v) extending 15 miles northwest of the Laredo, Texas, port of entry to the Brownsville, Texas, port of entry.

(B) PRIORITY AREAS.—With respect to the border described—

(i) in subparagraph (A)(ii), the Secretary shall ensure that an interlocking surveillance camera system is installed along such area by May 30, 2007, and that fence construction is completed by May 30, 2008; and

(ii) in subparagraph (A)(v), the Secretary shall ensure that fence construction from 15 miles northwest of the Laredo, Texas, port of entry to 15 southeast of the Laredo, Texas, port of entry is completed by December 31, 2008.

(C) EXCEPTION.—If the topography of a specific area has an elevation grade that exceeds 10 percent, the Secretary may use other means to secure such area, including the use of surveillance and barrier tools.

(2) PROMPT ACQUISITION OF NECESSARY EASEMENTS.—The Attorney General, acting under the authority conferred in section 103(b) of the Immigration and Nationality Act [8 U.S.C. 1103(b)] (as inserted by subsection (d)), shall promptly acquire such easements as may be necessary to carry out this subsection and

shall commence construction of fences immediately following such acquisition (or conclusion of portions thereof).

(3) SAFETY FEATURES.—The Attorney General, while constructing the additional fencing under this subsection, shall incorporate such safety features into the design of the fence system as are necessary to ensure the well-being of border patrol agents deployed within or in near proximity to the system.

(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this subsection not to exceed $12,000,000. Amounts appropriated under this paragraph are authorized to remain available until expended.

(c) WAIVER.—

(1) IN GENERAL.—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

(2) FEDERAL COURT REVIEW.—

(A) IN GENERAL.—The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have juris-

diction to hear any claim not specified in this subparagraph.

(B) TIME FOR FILING OF COMPLAINT.—Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.

(C) ABILITY TO SEEK APPELLATE REVIEW.—An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.